E COPY

Supreme Court, U. S.
FILED
OCT 2 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-371

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TAMIMENT, INC.,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

IRVING D. LIPKOWITZ
Attorney for Respondent
1290 Avenue of the Americas
New York, New York 10019

MELVIN SALBERG
LESTER BERKELHAMER
LIPKOWITZ, PLAUT, SALBERG & HARRIS
of Counsel

TABLE OF CONTENTS

	PAGE
Question Presented	1
Argument	2
Reasons For Denying The Writ	2
Conclusion	5

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-371

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

TAMIMENT, INC.,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Question Presented*

Whether the United States Court of Appeals for the Third Circuit correctly concluded that the employer, a self-contained resort facility, may assert its property rights and deny non-employee union organizers access to its premises where there are reasonable alternate means for communicating with employees available to the union? *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

---

* Respondent, being dissatisfied with Petitioner's Question Presented, presents the question pursuant to Rule 40.3 of this Court.

Argument

Reasons For Denying The Writ

1. The Decision Of The Court Of Appeals Conforms To The Applicable Decisions Of This Court.

The Court of Appeals for the Third Circuit held that under this Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) Tamiment, Inc., the employer, was not required to grant access to its premises to non-employee union organizers because there were reasonable alternate means of communication available. The Board disputes this interpretation contending the Third Circuit in effect misapplied the *Babcock* rule by unreasonably requiring the union to exhaust all communication alternatives or show that they clearly would be unsatisfactory before the union is entitled to access to the employer's premises. (Pet., [illegible], p. 8).

Contrary to the Board's position, the Third Circuit did not apply a test suggestive of any such strict standards. It carefully weighed the communication options available to the union and concluded that the union had not made reasonable efforts to utilize alternate channels to communicate with employees based upon the following facts:

a. The union made no effort to obtain a list of the employer's employees, which would have been forthcoming, so that it could write to them. (Pet., App. A, pp. A9-A10).

b. The union did not request permission to post notices to employees on the employer's premises, showing a "lack of initiative in devising techniques to meet with Tamiment's employees". (Pet., App. A, p. A10).

c. The union made no effort of any kind to arrange meetings off premises with employees. (Pet., App. A., p. A10).

In light of the union's failure to exercise even minimal efforts fundamental to any unionization drive, the Third Circuit properly determined under *Babcock* that there is no basis "to warrant an invasion of private property by non-employees for union organizational purposes". (Pet., App. A, p. A11). Under these circumstances the court of appeals correctly held that the union may not insist that the employer aid union organization. *Babcock*, 351 U.S. at 112.

The rule of this Court is that decisions of a court of appeals in a case involving the findings of an administrative agency should seldom be subject to review.

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

This Court's decision in *Central Hardware Co.* v. *NLRB*, No. 70-223, decided June 22, 1972, is to the same effect.

2. There Is No Conflict Between The Decisions Of The Third Circuit And The Second Circuit.

The decision in this case is not in conflict with the decision of the Second Circuit in *NLRB* v. *S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967). *Grossinger's* is clearly distinguishable from the instant case. There the employer not only turned down a union request for a list of employees, but also actively campaigned against the

union, unlawfully solicited employees to withdraw from the union and committed other substantial unfair labor practices designed to thwart the union's organization drive. None of these factors is present here. It should also be noted that the union's organization efforts in *Grossinger's* were much more extensive than those in the present case.

In a later case, also involving a self-contained resort, *NLRB* v. *Kutsher's Hotel and Country Club, Inc.*, 427 F.2d 200 (2d Cir. 1970), the Second Circuit distinguished *Grossinger's* and denied non-employee organizers access to the employer's premises. Although there was a public accessway in *Kutsher's*, the Second Circuit stressed that it could not characterize the scant union organizational efforts as meeting the reasonable union organziation efforts contemplated under *Babcock*. The concern of the Second Circuit over the union's minimal organization efforts in *Kutsher's* is instructive, particularly since the union's organization efforts there were substantially greater than those in the present case. From *Kutsher's* and the present case it is obvious that both courts believe that a union must make a reasonable showing of organization efforts before it will require an employer to grant access to its premises under the *Babcock* rule.

The Second Circuit, in further distinguishing *Kutsher's* from *Grossinger's*, pointed out that in *Grossinger's* there was union animus and unfair labor practices buttressing Respondent's position here that *Grossinger's* is different from the present case.

Under these circumstances, the Board is in error in maintaining that the two circuit courts applied different standards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING D. LIPKOWITZ
Attorney for Respondent

MELVIN SALBERG
LESTER BERKELHAMER
LIPKOWITZ, PLAUT, SALBERG & HARRIS
of Counsel

September 27, 1972.

COPY
(D)

Supreme Court, U. S.
FILED
OCT 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-371

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TAMIMENT, INC.,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Third Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

IRVING D. LIPKOWITZ
Attorney for Respondent
1290 Avenue of the Americas
New York, New York 10019

MELVIN SALBERG
LESTER BERKELHAMER
LIPKOWITZ, PLAUT, SALBERG & HARRIS
of Counsel

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-371

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

TAMIMENT, INC.,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Third Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Recently Decided Case

Subsequent to submission of Respondent's brief in this case, the Circuit Court of Appeals for the Second Circuit handed down an opinion in *NLRB* v. *New Pines,* 81 L.R.R.M. 2423 (2d Cir. Oct. 4, 1972). This is the third case it has decided in recent years involving, as does the *Tamiment* case, the question of the application of this Court's holding in *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956) regarding a demand for access to hotel premises by a union organizer.

In support of its holding in *New Pines*, the Second Circuit cited the Third Circuit decision in *Tamiment* concluding:

> "In short, on this record the union's organizing efforts were simply insufficient to require the hotel to grant access to the union's organizer. See NLRB v. Tamiment, Inc., 451 F. 2d 794 (3d Cir., 1971)."

Therefore, contrary to the contention of the National Labor Relations Board, the Second Circuit decision in *New Pines* further conclusively establishes that there is no conflict between the Second and Third Circuit regarding the standards applicable to this line of cases.

Respectfully submitted,

IRVING D. LIPKOWITZ
Attorney for Respondent

MELVIN SALBERG
LESTER BERKELHAMER
LIPKOWITZ, PLAUT, SALBERG & HARRIS
of Counsel

October 25, 1972